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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

AUG 17 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JIM CLICK AUTO MALL,)	
)	2 CA-IC 2008-0008
Petitioner Employer,)	DEPARTMENT A
)	
HARCO NATIONAL INSURANCE)	<u>MEMORANDUM DECISION</u>
COMPANY,)	Not for Publication
)	Rule 28, Rules of Civil
Petitioner Insurer,)	Appellate Procedure
)	
v.)	
)	
THE INDUSTRIAL COMMISSION OF)	
ARIZONA,)	
)	
Respondent,)	
)	
KEVIN LARSON,)	
)	
Respondent Employee.)	

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20030-800292

Insurer No. 717189226

Deborah P. Hanson, Administrative Law Judge

AWARD AFFIRMED

Goering, Roberts, Rubin, Brogna,
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H O W A R D, Chief Judge.

¶1 In this statutory special action, petitioners Jim Click Auto Mall (hereinafter Jim Click) and Harco National Insurance Company (hereinafter Harco National) challenge the administrative law judge's (ALJ) decision granting respondent Kevin Larson's petition for rearrangement of his permanent workers' compensation benefits. Because the decision is supported by substantial evidence and complies with the law, we affirm.

Facts and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's findings. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). Larson injured his lower back in 2003 while working for petitioner employer, Jim Click. Pursuant to his doctor's orders, Larson was prohibited from lifting heavy objects. Jim Click's insurer, respondent Harco National, accepted Larson's claim for

workers' compensation benefits. At the time, Larson stipulated that he suffered no loss in earning capacity.

¶3 Larson continued to work at Jim Click for some time in a modified capacity. Larson's earnings at his modified position were partially based on commission, however, and when his commissions began to drop, he began to search for new work. Jim Click learned that Larson was searching for a new job and therefore hired a new employee to replace Larson. Jim Click then terminated Larson, who eventually obtained employment at another car dealership.

¶4 Larson was soon laid off from his new job due to economic issues and began to search for work. Because of his lifting limitations and back pain, however, Larson was unable to find comparable employment and therefore took a lower paying job at a local store. Larson then filed a petition for rearrangement, asserting that his earning capacity had been reduced. The ALJ granted Larson's petition and concluded that Larson suffered a loss in earning capacity because he would have been qualified for a number of positions but for the injury he sustained while employed at Jim Click. The ALJ affirmed her decision on administrative review, and this statutory special action followed.

Insufficiency of the Evidence and Legal Error

¶5 Jim Click and Harco National (hereinafter petitioners) claim that the evidence and applicable law do not support the ALJ's conclusion that Larson was entitled to rearrangement. "We will not set aside the award if it is based upon any reasonable

interpretation of the evidence.” *Roberts v. Indus. Comm’n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989). But, we “review all questions of law de novo.” *Benafield v. Indus. Comm’n*, 193 Ariz. 531, ¶ 11, 975 P.2d 121, 125 (App. 1998).

¶6 Petitioners first contend that Larson was not entitled to rearrangement because he presented insufficient evidence to prove that he “sustained a loss in earning capacity related to his industrial injury.” The industrial commission may rearrange a workers’ compensation award on the basis of any change, physical or otherwise, that is related to the worker’s industrial injury and affects the claimant’s earning capacity. A.R.S. § 23-1044(F); *Stainless Specialty Mfg. Co. v. Indus. Comm’n*, 144 Ariz. 12, 18, 695 P.2d 261, 267 (1985).

¶7 The party petitioning for rearrangement has the burden of proving he has sustained a reduction in earning capacity related to his industrial injury. *See Gallegos v. Indus. Comm’n*, 144 Ariz. 1, 4, 695 P.2d 250, 253 (1985). To meet his burden, Larson must show “‘only . . . that his inability to secure or retain [comparably paying] work is at least partially injury related.’” *Id.*, quoting *Laker v. Indus. Comm’n*, 139 Ariz. 459, 462, 679 P.2d 105, 108 (App. 1984). He can do this by showing that he was unable to return to his date-of-injury employment, that he made a good faith effort to obtain other suitable employment, or by presenting testimony from a labor market expert to establish his post-injury earning capacity. *See Franco v. Indus. Comm’n*, 130 Ariz. 37, 39, 633 P.2d 446, 448 (App. 1981); *see also Kelly Servs. v. Indus. Comm’n*, 210 Ariz. 16, ¶ 8, 106 P.3d 1031, 1033 (App. 2005) (same). The burden then shifts to the petitioners to show lack of causation. *Gallegos*, 144

Ariz. at 4, 695 P.2d at 253. The ALJ must then consider all evidence, including any evidence presented as to whether the employee's inability to obtain work is due to economic conditions, "in determining whether and to what extent the injured employee has sustained any loss . . . of earning capacity." § 23-1044(G)(1), (2).

¶8 Here, Larson presented evidence from which the ALJ could have reasonably concluded that his reduction in earning capacity was at least partially related to his back injury. *See Roberts*, 162 Ariz. at 110, 781 P.2d at 588. Larson testified that his duties at Jim Click were modified to accommodate his physical limitations. He also testified that he applied for a similar position at another dealership, but was eventually given a very different job that required little lifting and physical exertion.¹ Larson further testified that, after being laid off from that job, he searched for new jobs with comparable salaries but was unable to find any, due in part to his physical limitations. Additionally, his labor market expert testified Larson was "disadvantaged" in finding comparable employment due to the limitations imposed by his back injury. Larson therefore sustained his initial burden and provided substantial evidence supporting the award both through his own testimony and that of an expert. *See Gallegos*, 144 Ariz. at 4, 695 P.2d at 253; *Franco*, 130 Ariz. at 39, 633 P.2d at 448.

¹Larson also testified that due to his physical limitations, he assumed his new position had been "made up" especially for him.

¶9 Petitioners claim, however, that Larson “retains the same ability he had in 2005, to perform all essential functions of the Jim Click . . . position within his work restrictions.” Therefore, petitioners contend, Larson’s injury has not contributed to his loss in earning capacity. Although that is a fact the ALJ was required to consider, it does not mandate that the ALJ’s decision was wrong as a matter of law. A Jim Click employee testified that once Larson was terminated by Jim Click, he was ineligible for re-hire under company policy. And the ALJ found that the job at the other car dealership was “made for him and did not exist in the general labor market.” After Larson lost his job at the second dealership, he was unable to find a comparable job due to his lifting limitations. The ALJ did not err in concluding that Larson’s earning capacity had been reduced as a result of his back injury. *See Nelson v. Indus. Comm’n*, 134 Ariz. 369, 373, 656 P.2d 1230, 1234 (1982) (“We are not the triers of fact and the Commission’s findings will not be disturbed unless its conclusion ‘cannot reasonably be supported on any reasonable theory of the evidence.’”), *quoting Perry v. Indus. Comm’n*, 112 Ariz. 397, 399, 542 P.2d 1096, 1098 (1975); *see also Harbor Ins. Co. v. Indus. Comm’n*, 127 Ariz. 394, 397-98, 621 P.2d 303, 306-07 (App. 1980) (evidence that claimant’s modified, post-injury position no longer available sufficient to sustain rearrangement).

¶10 Petitioners also contend that Larson chose to leave his job at Jim Click and therefore argue that Larson’s loss in earning capacity resulted from his termination from his subsequent job, not from his back injury while working at Jim Click. Additionally,

petitioners argue that labor market survey results “demonstrate that . . . Larson is qualified, within his given restrictions, for work . . . at wages in excess” of what he earned while at Jim Click. But both issues are questions of fact “to be resolved by the administrative law judge,” not this court. *Nelson*, 134 Ariz. at 372, 656 P.2d at 1233.

¶11 Moreover, to the extent petitioners are claiming that Larson’s reduction in earning capacity resulted from his having been laid off at his second job, “[t]ermination reasons unrelated to the industrial injury, such as layoff, strike, economic conditions, or misconduct become significant only where the evidence demonstrates that they, rather than claimant’s disability, caused the subsequent inability to secure work.” *Ariz. Dep’t of Pub. Safety v. Indus. Comm’n*, 176 Ariz. 318, 323, 861 P.2d 603, 608 (1993); *see also Oquita v. Indus. Comm’n*, 120 Ariz. 610, 611, 587 P.2d 1187, 1188 (App. 1978) (“[A]n applicant should not automatically be denied benefits simply because he lost a prior job due to economic or other non-disability related factors.”). And we have already explained that sufficient evidence was presented for the ALJ to conclude that Larson’s back injury was, in part, the cause of his inability to obtain comparably paying employment. *See Oquita*, 120 Ariz. at 612, 587 P.2d at 1189 (ALJ should consider extent to which claimant’s difficulties in obtaining new employment were related to his injury). We therefore reject petitioners’ argument.

¶12 Relying upon *Bryant v. Industrial Commission*, 21 Ariz. App. 356, 519 P.2d 209 (1974), petitioners also contend the ALJ’s decision that Larson was entitled to

rearrangement is “contrary to controlling Arizona Law.” Bryant was a truck driver who injured his back “in an industrially related accident.” *Id.* at 356, 519 P.2d at 209. He initially returned to his truck driving job, but later took a different post-injury job at no reduction in pay. *Id.* at 357, 519 P.2d at 210. More than eight years after being injured, Bryant quit this job and moved out of state for work. *Id.* Bryant’s new job, however, only lasted for a few days and was eventually terminated due to a lack of project funding. *Id.* When Bryant returned to Arizona, he was unable to find employment at his former level of pay because of a “difficult job market which existed for all workers, not only the disabled ones.” *Id.*

¶13 The ALJ in that case found that Bryant’s nearly nine years of post-injury employment created a presumption of no loss of earning capacity and that, based on the evidence, Bryant had failed to sustain his burden of proving he had a reduction in earning capacity as a result of the injury. *Id.* Division One of this court agreed and found that the cause of Bryant’s changed economic status was “of his own making and . . . similar to the risks encountered by all members of society.” *Id.* The court concluded, therefore, that Bryant had not suffered a loss in earning capacity as a result of his injury. *Id.*

¶14 The major difference between *Bryant* and this case is that here the ALJ determined Larson was unable to find similar work due, in part, to his back injury, which was a factual issue. *See Vance Int’l v. Indus. Comm’n*, 191 Ariz. 98, ¶ 6, 952 P.2d 336, 338 (App. 1998) (we defer to ALJ’s factual determinations). Additionally, the ALJ in this case concluded that Larson had not voluntarily left his job at Jim Click; rather, the ALJ found that

Larson had been terminated. Moreover, the ALJ determined that Larson's subsequent job was made for Larson and therefore concluded that Larson's injury precluded him from finding similar work upon termination. Unlike Bryant, Larson's loss in earning capacity was not "of his own making" but due to his back injury and other factors outside of his control. The ALJ's decision is not contrary to the holding in *Bryant*.

¶15 Petitioners also contend, however, that the ALJ's decision was contrary to *Bryant* because like the claimant in *Bryant*, Larson's injury did not cause him to lose either his job at Jim Click or his subsequent job. But the issue at hand is not whether Larson's injury caused his job loss but whether the injury contributed to Larson's loss in earning capacity. See *Stainless Specialty Mfg. Co.*, 144 Ariz. at 18, 695 P.2d at 267. And we have already explained that sufficient evidence was presented showing that Larson was unable to find comparably paying employment due to his injury.

¶16 Petitioners finally claim the ALJ erroneously concluded that Larson's post-injury jobs were sheltered work that "does not exist in the general labor market."² Petitioners assert that this determination resulted in an incorrect computation of Larson's true earning capacity because the ALJ should have considered Larson's post-injury jobs in calculating any change in his earning capacity.

²Although the ALJ never explicitly labeled Larson's post-injury jobs as sheltered, she did state that one job was "made for him and does not exist in the general labor market."

¶17 Sheltered work results “when an employer retains ‘at their previous wages . . . employees disabled as the result of on-the-job injuries.’” *Rent A Center v. Indus. Comm’n*, 191 Ariz. 406, ¶ 8, 956 P.2d 533, 535 (App. 1998), *quoting Allen v. Indus. Comm’n*, 87 Ariz. 56, 67, 347 P.2d 710, 718 (1959). Therefore, sheltered work does not reflect the true earning capacity of the employee in a competitive situation. *Id.* As a result, the employee’s earning capacity cannot be correctly determined based upon his wages in sheltered work. *Id.* Rather, the employee’s earning capacity must be measured by “‘competition in the open labor market.’” *Id.*, *quoting Doles v. Indus. Comm’n*, 167 Ariz. 604, 607, 810 P.2d 602, 605 (App. 1990).

¶18 Petitioners contend that Larson’s post-injury work at Jim Click was not sheltered work because the position was a “regular employment position at Jim Click.”³ But even assuming the position regularly existed at Jim Click, Larson was only offered it after he was injured as an accommodation for his lifting restrictions. And petitioners have not presented any evidence that Larson would have been qualified for the job or offered it under any other circumstance. Petitioners contend, however, that Larson’s second job, obtained after he was terminated from Jim Click, was also improperly considered to be sheltered work.

³In their reply brief, petitioners also argue for the first time that Larson’s post-injury job at Jim Click cannot be considered sheltered work because he did not claim that it did not reflect his true earning capacity when the ALJ initially decided his claim for workers’ compensation benefits in 2005. But arguments not clearly raised in the opening brief on appeal are usually deemed waived. *See Meiners v. Indus. Comm’n*, 213 Ariz. 536, n.2, 145 P.3d 633, 635 n.2 (App. 2006). We therefore do not consider this contention.

But Larson testified that his second job had been created for him and also stated that the job could not be found in the general labor market. The ALJ found Larson's testimony to be credible and we defer to the ALJ's factual determinations. *See Vance*, 191 Ariz. 98, ¶ 6, 952 P.2d at 338. In any event, we have already explained that Larson presented sufficient evidence for the ALJ to conclude that he could not find a comparably paying job due to his back injury. *See Oquita*, 120 Ariz. at 612, 587 P.2d at 1189 (ALJ should consider extent to which injury might prevent employee from obtaining work he might otherwise be able to secure but for his injury). We therefore affirm the ALJ's determination that Larson was entitled to rearrangement.

Failure to Make Findings on Material Issue

¶19 Petitioners also argue the ALJ failed to make any findings, pursuant to § 23-1044(G), as to the “material issue of whether factors other than the industrial injury caused a reduction in . . . Larson's earning capacity.” Section 23-1044(G)(1) requires the ALJ to consider whether Larson's inability to obtain comparably paying employment was due, “in whole or in part, to economic or business conditions, or other factors unrelated to the industrial injury.”

¶20 “To prevent appellate courts from having to assume a factfinder role, an administrative law judge must [make factual findings] on all the case's material issues.” *Post v. Indus. Comm'n*, 160 Ariz. 4, 7, 770 P.2d 308, 311 (1989). “[T]he lack of findings on material issues does not invalidate an award per se,” *Cavco Indus. v. Indus. Comm'n*, 129

Ariz. 429, 435, 631 P.2d 1087, 1093 (1981), but the ALJ's findings of fact must be sufficient enough to allow the reviewing court to determine that "the basis of the hearing officer's determination was legally sound." *Garcia v. Indus. Comm'n*, 26 Ariz. App. 313, 315, 548 P.2d 26, 28 (1976) (holding that because the ALJ's award could be sustained on two conflicting theories, the award must be set aside). Therefore, "[a] specific finding [is] unnecessary as to how the ultimate finding was reached [if] it can be determined from an examination of the record." *Cavco*, 129 Ariz. at 435, 631 P.2d at 1093; *cf. Pearce Dev. v. Indus. Comm'n*, 147 Ariz. 582, 583, 712 P.2d 429, 430 (1985) (holding that although the ALJ could have been more specific in stating the basis for reopening the claim, the record supported the ALJ's ultimate finding).

¶21 In this case, the ultimate issue was whether Larson's injury, sustained while working at Jim Click, reduced his earning capacity. The ALJ carefully detailed the testimony of the claimant and employer's witnesses and then made several findings of fact on material issues leading to the ultimate issue. First, the ALJ found Larson's testimony credible and resolved, in his favor, the issues of whether he had been terminated involuntarily from Jim Click and whether his second job existed in the general labor market. Second, the ALJ resolved a conflict between two expert labor market consultants by adopting the opinion of Larson's expert, Staci Schonbrun, as the more "well-reasoned and well-founded." Thus, the ALJ agreed with Schonbrun's opinion that Larson's injury, not other factors, was the reason for his reduced earning capacity. The ALJ also specifically stated that she had considered

§ 23-1044(G) in making her determination and discussed testimony involving whether factors other than Larson’s injury could have caused his reduction in earning capacity. Finally, the ALJ made a finding on the ultimate issue that Larson had sustained his burden of proving that he was entitled to rearrangement.

¶22 Although petitioners complain that the ALJ did not make findings concerning their evidence, the ALJ recited and clearly considered the evidence. The fact that she chose to believe Larson’s evidence and make findings based on that does not indicate she did not consider the other evidence. Because the ALJ relied upon Schonbrun’s and Larson’s testimony, and specifically considered § 23-1044, we can determine “how the ultimate finding was reached.” *Cavco*, 129 Ariz. at 435, 631 P.2d at 1093. Accordingly, the ALJ did not fail to make findings pursuant to § 23-1044(G).

Disposition

¶23 The ALJ’s award is affirmed.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

JOHN PELANDER, Judge